In the

Supreme Court of The United States

OCTOBER TERM, 1978

No. 78-1484

RUBY COMPANY, a Utah corporation, *et al*
Petitioners,

vs

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE G. HIGER
THOMAS R. LINVILLE
Eberle, Berlin, Kading, Turnbow
& Gillespie, Chartered
Attorneys for Petitioners
300 North Sixth Street
Post Office Box 1368
Boise, Idaho 83701

In the

Supreme Court of The United States

OCTOBER TERM, 1978

No. _____

RUBY COMPANY, a Utah corporation, *et al*
Petitioners,

vs

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DALE G. HIGER
THOMAS R. LINVILLE
Eberle, Berlin, Kading, Turnbow
& Gillespie, Chartered
Attorneys for Petitioners
300 North Sixth Street
Post Office Box 1368
Boise, Idaho 83701

INDEX

AUTHORITIES

Cases:

Statutes:

Miscellaneous:

In the

Supreme Court of The United States

OCTOBER TERM, 1978

No. _____

RUBY COMPANY, a Utah corporation, *et al*
Petitioners,

vs

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Your Petitioners pray that a writ of certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit rendered in these proceedings on November 8, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 21-39) is reported in 588 F.2d 697. The order of the Court of Appeals (Appendix A, *infra,* p. 40) is unreported. The judgment, amended judgment, findings of fact and conclusions of law, and amendment to findings of fact and conclusions of law *nunc pro tunc* of the District Court (Appendix B, *infra,* pp. 41-56) are unreported.

JURISDICTION

The opinion of the Court of Appeals (Appendix A, *infra*, p. 21) was filed on November 8, 1978. A timely petition for rehearing was denied on December 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the United States should be estopped from asserting claim to certain lands lying along a portion of the Snake River located in Idaho.

STATEMENT OF FACTS

In 1876, John B. David was employed by the United States to survey certain lands situated along the Snake River in Idaho. David's contract required, among other things, that he determine the location of the river by establishing meander lines. David completed his survey in April 1877. On the basis of David's field notes, an official plat of these lands was prepared, certified and filed by the Surveyor General's Office at Boise, Idaho.

On June 19, 1891, the United States issued a patent to a portion of these lands to Rosehannah Forbes. The patent conveyed a particular lot, the east line of which is depicted on the plat as the meander line of the Snake River. The Petitioners[1] are successors in interest of the

[1]The remaining Petitioners are: Lola D. Bitton, an individual; J. R. Simplot Realty Corporation, an Idaho corporation; Hopkins Packing Company, an Idaho corporation; Brigham H. Worthen and Josephine Worthen, husband and wife; Arthur Johnson Company, an Idaho corporation; Douglas Johnson, an individual; Winona A. Gorder, formerly Winona A. Johnson, an individual; Estate of Elmer A. Johnson, deceased; Ernest Johnson, as trustee for others; Gerald E. Miller and Adalene B. Miller, husband and wife; Custom Body Works, a co-partnership; Oborn Brothers, a partnership; and The Bingham Title and Trust Co., an Idaho corporation.

original patentee, have been in possession of this land since 1891 without challenge by the United States until 1957 and have made substantial and valuable improvements thereon.

In 1922, the United States directed Robert Farmer, a cadastral engineer of the Bureau of Land Management, to make an investigation of the meander lines of the Snake River as shown by the David survey. Farmer reported that the David meander of the Snake River in the area examined was fraudulent. As a result, the Surveyor General of Idaho recommended that a resurvey be made of the lands reported by Farmer to have been omitted from the original survey. In 1923, the General Land Office of the Department of Interior disapproved this recommendation. This recommendation was based in part on the fact that the General Land Office seemed to have doubts that the original survey was fraudulent, felt that, even if fraud be proved, the value of the small amount of public land involved would not be worth the expense of resurvey and recognized that practically all of the lands had passed into private ownership and that the owners of the land on both sides of the river were claiming to the banks of the river.

The foregoing was the official position of the United States until 1957. In that year, the Bureau of Land Management ordered a resurvey of the lands bordering on the Snake River and lying within the meander lines of the David survey of 1877. As a result of this survey, the Bureau of Land Management determined that the David survey of the original meanders was grossly erroneous and fictitious resulting in the omission of some 14,000 to 16,000 acres from the origin-

al survey. These omitted lands lie between the river's actual bed and David's meander lines.

The United States brought suit in the District Court to quiet title in the omitted lands pursuant to the provisions of 28 U.S.C. §1345. Petitioners' counterclaimed requesting that title be quieted in them on several theories including that the United States should be estopped from asserting any claim to this land. The District Court ruled that the 1876 survey was grossly inaccurate so that the patent issued by the United States conveyed only up to David's actual meander line and not up to the actual water line.[2] The District Court specifically found that all elements of estoppel were established by the Petitioners, but concluded "as a matter of law that estoppel will not lie as to the United States".

A timely appeal was made by the Petitioners to the Court of Appeals. In a split decision, the Court of Appeals held that: (1) the evidence sustained a determination that the 1876 survey was grossly inaccurate so that the patent issued by the United States conveyed only up to the actual meander line and not up to the actual water line; (2) the doctrine of estoppel could be applied against the United States, but (3) there was no showing of affirmative misconduct on the part of the United States which would estop it from asserting title to the omitted lands. From this final holding, your Petitioners have petitioned for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The majority opinion of the Court of Appeals relating to governmental estoppel is squarely in

[2]See discussion of rule of law by the Court of Appeals beginning on p. 22 of Appendix A.

conflict with earlier decisions of the Ninth Circuit and is inconsistent with other decisions of other courts of appeal.

At the present time, there are three independent theories concerning estoppel against the Government which have been adopted by this Court and the various courts of appeal which are inconsistent and which should be resolved by this Court:

(1) The traditional view that estoppel may not lie against the Government;

(2) The transitional view that estoppel may lie against the Government when the Government has acted in a proprietary rather than in a sovereign capacity; and

(3) The modern view that estoppel is available against the Government where justice and fair play requires it.

One must trace the historical development of the governmental estoppel doctrine to comprehend the reasons why the law amongst the circuits is so diverse.

A. *Estoppel Against The Government – The Traditional American View.*

For many years, the traditional rule in the United States concerning estoppel against the Government was that the principle of equitable estoppel could not be invoked against the United States or a sovereign state. This view arose largely as a corollary to the doctrine of sovereign immunity. See 2 K. Davis, Administrative Law Treatise, §17.01, at 491 (1958). In the leading case expressing the limitations of equitable estoppel against the Government, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 61 L.Ed. 791, 37 S. Ct.

387 (1917), this Court held that the United States is neither bound nor estopped by the acts of its officers or agents who have entered into an arrangement or agreement to do or to cause to be done what the law does not sanction or permit.

This traditional view prohibiting governmental estoppel was buttressed by the case of *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 92 L.Ed. 10, 68 S. Ct. 1, 175 A.L.R. 1075 (1947). In *Merrill,* this Court held that a farmer could not recover on a policy of wheat insurance issued to him by the Federal Crop Insurance Corporation because an agency regulation forbade insurance on his particular crop, although the agency's representative had knowledge of the crop planted and assured the farmer that his crop was covered. This Court said that it assumed that recovery could be had against a private insurance company on these facts, but pointed out that the policy was void since third parties entering into an arrangement with the Government take the risk of having accurately ascertained the scope of authority of officers and agents of the Government. In short, the Court charged every citizen with knowledge, not only of the law, but the rules of the Federal Register. See *Federal Crop Insurance Corp. v. Merrill, supra,* at 92 L.Ed 15.

Relying on the *Utah Power & Light Company* and *Merrill* cases, *supra,* as precedent, many courts denied estoppel against the Government on the grounds that the Government could not be estopped on the erroneous, unauthorized or illegal actions of its agents. The traditional rule appears to remain viable in the Second Circuit Court of Appeals, the Fourth Circuit Court of Appeals, the Eighth Circuit Court of Appeals, and the

Tenth Circuit Court of Appeals. See *United States v. Zenith-Godley Co.,* 295 F.2d 634 (2nd Cir. 1961); *James v. United States,* 185 F.2d 115, 22 A.L.R. 2d 830 (4th Cir. 1950); *Loftus v. Mason,* 240 F.2d 428 (4th Cir. 1957), *cert. denied,* 353 U.S. 949, 1 L.Ed.2d 858, 77 S. Ct. 860; *Stone v. United States,* 286 F.2d 56 (8th Cir. 1961); *Atlantic Richfield Co. v. Hickel,* 432 F.2d 587 (10th Cir. 1970). Notwithstanding, as the doctrine of sovereign immunity gradually eroded, the courts began to offer legal justifications for estoppel against the Government.

B. *Estoppel Against The Government – The Sovereign-Proprietary View.*

Because of harshness of result and mounting criticism of the cases refusing to estop the Government, courts began to develop mechanisms to circumvent the traditional rule. One such method was merely a corollary to the traditional rule in that it permitted estoppel where the acts or omissions of the officers of the Government were authorized (as distinguished from unauthorized) to bind the United States in a particular transaction and the officers of the Government acted within the scope of their authority. See *Walsonavich v. United States,* 335 F.2d 96 (3rd Cir. 1964). Perhaps the more dominant view was to find estoppel when the Government acted in a proprietary rather than a sovereign capacity. This transitional view appears to be the predominant rule in the First Circuit Court of Appeals and the Fifth Circuit Court of Appeals. See *Krupp v. Federal Housing Administration,* 285 F.2d 833 (1st Cir. 1961); *United States v. Lewis,* 202 F.2d 102 (5th Cir. 1953); *United States v. Florida,* 482 F.2d 205 (5th Cir. 1973).

The sovereign-proprietary view has its roots in the recognition that the Government, in its sovereign capacity, protects interests unique to the public as a whole, while in its proprietary capacity, the Government acts as a private individual. Permitting estoppel of the Government when it acted as a private individual, in its proprietary capacity, seemed unlikely to intrude upon unique governmental interests. Although the reasoning of the sovereign-proprietary view appears to be sound, in practice it has proved difficult to apply as a result of its inherent artificiality and ambiguity. Consequently, at least one court of appeals has expressly rejected the sovereign-proprietary distinction altogether. See *United States v. Lazy FC Ranch,* 481 F.2d 985, 989, n. 5 (9th Cir. 1973).

C. *Estoppel Against The Government – The Modern View.*

In a series of recent cases, the Ninth Circuit Court of Appeals has abandoned both the traditional and sovereign-proprietary views on governmental estoppel in favor of a more modern view that estoppel is available against the Government where justice and fair play requires it.

In *United States v. Georgia-Pacific Company,* 421 F.2d 92 (9th Cir. 1970), the Government sued for specific performance of a 1934 agreement wherein Georgia-Pacific's predecessor had agreed to convey certain forest lands to the Government if the Government would increase the boundaries of a national park to include these lands. The purpose of such conveyances was fire protection. In 1958, the Government put the boundaries back to their pre-1935 site and thereafter Georgia-Pacific used the land as its own without Government interference, spending a significant amount of money managing the land for timber yield. Under these circumstances, the Ninth Circuit held that equitable estoppel applied against the Government and refused to specifically enforce the 1934 agreement. Although the court noted that the Government was acting in its proprietary capacity, it expressed no opinion as to the importance of that distinction.

In *United States v. Lazy FC Ranch, supra,* a farm partnership received soil bank payments exceeding the maximum allowed by regulation and the Government sued to recoup the money. Although the contract when entered into was legal, the contract violated subsequent changes in the federal regulations. The Government had arranged and approved the contractual agreement which enabled the partners to qualify for the payments before the change in governmental regulations. In applying estoppel against the Government, the court relied upon *Moser v. United States,* 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951); *Brandt v. Hickel,* 427 F.2d 53 (9th Cir. 1970); and *Schuster v. C.I.R.,* 312 F.2d 311 (9th Cir. 1962). This line of cases was summarized in *Lazy FC Ranch* as follows:

> "The *Moser-Brandt-Schuster* line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. Gestuvo v. District Dir. of I. N. S., 337 F.Supp. 1093 (C.D.Cal. 1971). This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from

proprietary) although we may be more reluctant to estop the government when it is acting in this capacity." 481 F.2d at 989.

In *United States v. Wharton,* 514 F.2d 406 (9th Cir. 1975), where title to public lands was in question, the court reiterated its position that estoppel was not limited to proprietary acts. In evaluating whether estoppel should be applied against the Government, the court in *Wharton* affirmed the test adopted earlier in *Georgia-Pacific:*

"The test of estoppel applied in this circuit was outlined in Georgia-Pacific, 421 F.2d at 96:

"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former conduct to his injury." 514 F.2d at 412.

Since *Wharton,* the Ninth Circuit has adhered to the approach adopted in *Georgia-Pacific.* See *U.S. v. 31.43 Acres Of Land, More or Less, Etc.,* 547 F.2d 479 (9th Cir. 1976); *California Pacific Bank v. Small Business Admin.,* 557 F.2d 218 (9th Cir. 1977). These cases demonstrate that once all of the elements of estoppel have been met, the Ninth Circuit applies a balancing test weighing the tendency of the Government's conduct to work a serious injustice upon private parties against the contravening interest of the public not to be unduly damaged by the imposition of estoppel.

However, recently the Ninth Circuit has embraced an additional requirement which is in contradiction to

the test previously adopted and followed by the court. It is now clear by way of the lower court's decision in the case at bar that estoppel can only be invoked against the Government if there exists "affirmative misconduct" on the part of the Government. This new requirement of "affirmative misconduct" was first mentioned in *Santiago v. Immigration and Naturalization Service,* 526 F.2d 488 (9th Cir. 1975), *cert. denied,* 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976).

In *Santiago,* the requirement of affirmative misconduct was limited to the context of immigration cases. In comparison, the Ninth Circuit in the case at bar has extended the requirement of "affirmative misconduct" to all cases where the Government is sought to be estopped. See *United States v. Ruby Co.,* 588 F.2d 697, 703 (9th Cir. 1978). Hence, the Ninth Circuit has qualified its previous test for invoking estoppel by requiring a finding of "affirmative misconduct" in addition to the other elements of estoppel formulated in *United States v. Georgia-Pacific Company, supra.*

The genesis of the Ninth Circuit's new requirement of "affirmative misconduct" is *United States Immigration and Naturalization Service v. Hibi,* 414 U.S. 5, 38 L.Ed.2d 7, 94 S.Ct. 19, *rehearing denied,* 414 U.S. 1104, 38 L.Ed.2d 559, 94 S.Ct. 738 (1973). Close scrutiny of *Hibi,* reveals, however, that the Ninth Circuit's requirement of affirmative misconduct is misplaced.

II. Consideration by this Court is necessary on the independent ground that the Court of Appeals has adopted a standard which is misplaced in view of the previous decisions of this Court.

The most recent pronouncement by this Court regarding governmental estoppel in the immigration and nationality context is *Immigration and Naturalization Service v. Hibi, supra.* In *Hibi,* a Filipino filed a petition for naturalization under the Nationality Act of 1940, which provided for overseas naturalization of aliens who had honorably served in the armed forces during World War II. Although the Act required that the petition for naturalization be filed by 1947 and while the petitioner was still in the service, Hibi did not file until 1967, 22 years after his discharge. He alleged that the INS should be estopped from using his tardiness to deny his application because he had no notice of his right to apply for naturalization during the statutory period, and because the Government had failed to provide a naturalization officer in the Philippines during the time of his eligibility. This Court held in *Hibi* that estoppel could not be invoked against the Government because no "affirmative misconduct" by the Government had been shown.

The significance of *Hibi* lies on its emphasis on "affirmative misconduct", a factor which had not before played an important roll in estoppel decisions. Yet, although the "affirmative misconduct" requirement was pivitol in *Hibi,* reference in *Hibi* to "affirmative misconduct" was ambiguous. This Court did not define the term, referring rather to *Montana v. Kennedy,* 336 U.S. 308, 6 L.Ed.2d 313, 81 S.Ct. 1336 (1961) for explanation. The *Montana* case did not allow estoppel, but gave implicit approval to the cases of *Podea v. Acheson,* 179 F.2d 306 (2nd Cir. 1950) and *Lee Bang Hong v. Acheson,* 110 F.Supp. 48 (Hawaii, 1951). Those cases did not expressly refer to "affirmative misconduct", but rather defined the conduct in terms of negligence

and erroneous advice. In a third case approved by *Montana,* the Seventh Circuit stated that "the government had carelessly or willfully prevented" the petitioner from doing that which it was necessary to obtain citizenship. See *Lou You Fee v. Dulles,* 236 F.2d 885, 887 (7th Cir. 1956). Thus, this Court by referring for clarification to *Montana,* inferentially defines "affirmative misconduct" as anything ranging from negligence to willfulness.

A more forceful demonstration of the ambiguity is found in the opinions of *Santiago v. Immigration and Naturalization Service, supra,* and the court of appeal's decision in the instant case where both the majority and dissent applied the "affirmative misconduct" test, focused on the exact same governmental conduct, but reached different conclusions as to whether the conduct was sufficiently pernicious to meet the *Hibi* standard.

Judge Ely in his clairvoyant dissent fully comprehended the inherent ambiguity of the "affirmative misconduct" test, by concisely stating in *United States v. Ruby Co., supra,* at 705 and 706 (9th Cir. 1978):

> "ELY, Circuit Judge, dissenting:
>
> "I respectfully dissent. As I see it, the result reached by my Brothers is not only unjust, but also, that result is not legally required.
>
> "In Part II of its opinion, the majority concludes that estoppel is not here applicable against the Government because the Government committed no affirmative misconduct. I have no quarrel with my

Brothers' statement as to the basic legal principle that should be applied. It is now clear beyond question that the law of our circuit requires a showing of affirmative misconduct before the Government may be estopped. California Pac. Bank v. Small Business Admin., 557 F.2d 218, 224 (9th Cir. 1977); Santiago v. I & NS, 526 F.2d 488, 491-93 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). It is the majority's application of the principle that I deeply feel to be thoroughly wrong.

"As written by our Brother Choy, with those perceptive comments I recently joined in Santiago, ' *"(a) ffirmative" and "negative," like "misfeasance" and "nonfeasance," are indeed slippery terms. Each one of the claims paraphrased negatively can readily be restated affirmatively . . . But it is not how we cast the facts, but the facts themselves that should dictate the nature of relief warranted."* ' Santiago v. I & NS, supra, at 495 (emphasis in original). Our decisions in this area have indicated that reasonable flexibility is not only desirable, but also is required. This is so that estoppel against the Government may lie 'where justice and fair play require it.' United States v. Lazy FC Ranch, 481 F.2d 985, 988 (9th Cir. 1973)." [Emphasis added.]

Thus, certiorari should be granted to clarify the current status of the law under *Hibi*. Indeed, to do otherwise, would ignore the present ambiguities of the "affirmative misconduct" test created by *Hibi* and countenance the Ninth Circuit's action in this case where the requirement of "affirmative misconduct" has been elevated to a preemptive level in all governmental estoppel cases.

The Ninth Circuit has committed reversible error in its conclusion that, absent a finding of "affirmative misconduct", the other elements of estoppel can not be considered. This Court, in *Hibi*, gave no indication that it intended to raise the "affirmative misconduct" test to this determinative level. In fact, in the only two sentences addressing this factor, this Court gave no indication whatsoever of the weight it should be given:

> "While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, . . . no conduct of the sort there adverted to was involved here. We do not think that failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government." 414 U.S. at 8-9.

In view of the weak factual basis for an estoppel in *Hibi,* it is possible that this Court only meant to indicate that there must be at least some conduct to which blame could attach. Because the facts did not make out estoppel under any theory, it cannot be inferred that this Court found the absence of "affirmative misconduct" in itself sufficient to defeat the petitioner's claim.

The Ninth Circuit should not have focused on an ambiguous phrase like "affirmative misconduct" to the exclusion of the the other elements of estoppel. Raising such a term to this determinative level obscures the real issues involved and changes the estoppel analysis

from an equitable balancing test into a one-sided formula with but one variable. The *Hibi* opinion did not require such a talismanic approach, especially under the circumstances presented in this case.

The Government's conduct in the case at bar was clearly of a nature to require it to be estopped. It is undisputed on appeal that the trial court and district judge specifically found that all elements of estoppel were established by a preponderance of the evidence. See Appendix B, p. 54.

The Government was fully informed of the David survey in 1877 by David's field notes and the plat was prepared and approved following regular governmental procedures. Moreover, the Government land officers knew at least by 1923 of the alleged erroneous survey and that the patentees of lots bordering the river and their successors were claiming fee ownership to the boundaries of the river. By issuing its patent based upon the David survey and plat, which conveyed title to the boundaries of the Snake River, the Government intended that individuals take title and possession to the boundaries of the river. Certainly, patentees in this case and their successors had a right to believe that it was the intent of the Government to grant them the lands specified in the Government's own survey, plat and patent. Moreover, in 1923 when requested to resurvey the Snake River, the officials of the Government declined to do so and established a firm policy of recognizing the titles claimed by patentees of lots bordering the river. This firm position of the Government became widely known and relied upon by lawyers, courts, lending institutions, title insurance companies, and the public generally. Patentees and their successors, in good faith, and ignorant of the errors in the David survey, improved their property for generations with homes, farms, ranches, business buildings, land leveling, diking and grading while paying taxes on the property.

By invoking estoppel against the Government in this case, the interest of the public is not unduly threatened. Rather, the honor and integrity of the Government would be confirmed by the courts. The value of the disputed lands in 1877 was minimal and inconsequential. The Government's policy and intent at that time was to foster and promote the settlement and improvement of such lands. This was accomplished by the patentee and her successors with the end result of improving the entire area, adding to state tax rolls, contributing to the national economy and certainly to the national treasury in the form of income taxes paid by the patentee and her successors. One can hardly imagine a greater injustice than that which would be imposed upon the patentee and her successors, if the Government was permitted after 80 years of recognition of the validity of title to the subject land to now be permitted to take such land from the patentee and her successors. Perhaps this point has been best summarized by Judge Ely in his poignant dissent in the lower court:

> "While I am not unmindful of the majority's admonition that the public land belongs to the people of our country, I am unwilling to subvert the legitimate expectations and equities of the innocent landowners in our case by uttering generalized plati-

tudes about the public welfare. These landowners and their predecessors in interest relied upon the accuracy of the David survey for over 60 years before the Government undertook to divest their title. To me, this concatenation of circumstances, taken as a whole, seems virtually intolerable from the standpoint of equity. Moreover, I do not see that the national interest will 'be unduly damaged by the imposition of estoppel.' *United States v. Lazy FC Ranch, supra,* at 989. The concurrence of the Government's affirmative misconduct and the overwhelming equitable considerations favoring the landowners drives me to believe that the Government's misrepresentation that it had abandoned all claims, allowed to go uncorrected for so many years, should prevent the abuse that it has, in this case, visited upon some of its people.

"Regardless of so-called public interest, our Country was founded upon the ideal that every citizen was a sovereign in his own right, and that one of them, even though only a poor householder on the bank of a stream, should never again live under the threat of authoritarian abuse and mistreatment. Now, while we profess outrage at what we see as inhumanitarian treatment of powerless peoples in some parts of the world, our court permits our own Government, supposedly benevolent, to void a patent it issued 86 years ago and, as to its validity, reaffirmed 32 years later. And to what end? That it regain title to lands, insignificant to the Government in area and long thought to be vested in a few private individuals. The tragic price of conferring this relatively inconsequential benefit on the Government is the en-

forced eviction of the innocent appellees and their families from their homelands. This injustice my Brothers do under what they perceive to be 'the countervailing interest of the public.' I decry that approach, believing that the truest, most immutable interest of the American public is the protection of individual citizens in their property rights, as in their personal rights, and the unswerving resistance to the type of governmental deception, abuse, and intrusion that we ordinarily associate with totalitarian regimes.

"I would reverse." 588 F.2d 697 at 707.

CONCLUSION

The conflict amongst the circuits involving the frequently recurring question of law concerning governmental estoppel and the lower court's misplaced application of the *Hibi* case demonstrates that this petition for a writ of certiorari should be granted to reestablish a uniform body of law on the frequently important legal question of when the Government may be estopped.

Respectfully submitted,

DALE G. HIGER

THOMAS R. LINVILLE

Eberle, Berlin, Kading, Turnbow,
& Gillespie, Chartered
300 North Sixth Street
Post Office Box 1368
Boise, Idaho 83701

Attorneys for Petitioners

March 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
vs.	)	No. 75-1411
RUBY COMPANY, a Utah Corporation, et al.,	)	OPINION
Defendants-Appellants.	)	

Appeal from the United States District Court for the District of Idaho

Before: ELY and WALLACE, Circuit Judges, and BYRNE,* District Judge

WALLACE, Circuit Judge:

Appellants are landowners against whom title was quieted to some 108.36 acres of land in Idaho. They raise contentions regarding sufficiency of the evidence and important questions concerning the doctrine of estoppel and its application to the government. We affirm.

In 1876, David contracted with the United States to survey certain lands situated along the Snake River in Idaho. As part of his task, David was required to determine the location of the river and to represent its situs by establishing meander lines. David completed his survey in April 1877. On the basis of his efforts, an official plat of the area was prepared and certified by the Surveyor General's Office at Boise, Idaho.

On June 29, 1891, the United States issued a patent

*Honorable William Matthew Byrne, Jr., United States District Judge, Central District of California, sitting by designation.

to Forbes which conveyed a particular lot, the east boundary of which is described as the meander line of the Snake River. The landowners are successors in interest of the original patentee.

In 1922, the Bureau of Land Management (BLM) made an investigation of the meander lines of the Snake River as represented by the David survey. The BLM concluded that David's meander line was fraudulent. As a result, the Surveyor General of Idaho recommended that a proper survey be made. In 1923, the General Land Office of the Department of Interior disapproved the recommendation.

In 1957, the BLM ordered a survey of the lands bordering the Snake River lying within the meander lines of the David survey. On the basis of this survey, the BLM concluded that the meander lines of the David survey were grossly erroneous. The variance in the actual position of the river banks and their position as represented by David resulted in some fourteen to sixteen thousand acres being omitted from the original survey. These omitted lands lie between the river's actual bed and David's meander lines.

The United States brought suit to quiet its title in the omitted lands.[1] The landowners counterclaimed, praying that title be quieted in them. After a protracted period of delays and litigation, the district court entered judgment in favor of the United States.

I

The landowners' contentions arise primarily out of the application of the principle of conveyancing that

[1]Although the lands omitted by the David survey constitute some 14,000 to 16,000 acres,this suit pertains to only 108.36 acres.

the transferee of a parcel of real property, which is described as bounded by a body of water, takes title up to the actual water line. Thus, in the case of a federal land patent, the patentee takes title up to the actual water line, even though the survey on which the patent is based inaccurately depicts the position of the river. The underlying theory is that the surveyor's meander line is primarily used as an aid in calculating the size of the tract and does not independently operate to determine the dimensions of the conveyance. *Producers Oil Co. v. Hanzen,* 238 U.S. 325, 339 (1915); *Horne v. Smith,* 159 U.S. 40, 42 (1895); *Railroad Co. v. Schurmeir,* 74 U.S. (7 Wall) 272, 286-87 (1869).[2] Based upon this legal premise, the landowners argue that the original patentee acquired the title up to the actual bank of the Snake River and that the present landowners, whose titles are derived from the patentee via intermediate conveyances, have title up to the actual water line.

There is, however, a second relevant principle of conveyancing which is an exception to the first. According to this limitation, when fraud or gross error causes severe inaccuracies in the position of the meander lines, the patent conveys only up to the meander line. Consequently, title to the lands lying between the fraudulent or grossly erroneous meander line and the actual water line remains the property of the United States. *Jeems Bayou Fishing & Hunting Club v. United States,* 260 U.S. 561, 564 (1923); *Lee Wilson & Co. v. United States,* 245 U.S. 24, 29 (1917); *Security Land and Exploration Co. v. Burns,* 193 U.S. 167, 180-83 (1904). The policy underpinnings of this rule are two-

[2]The classic statement of this rule appears in Horne v. Smith, supra, 159 U.S. at 42: "[A] meander line is not a line of boundary, and . . . a patent for a tract of land bordering on a river conveys the land, not simply to the meander line, but to the water line . . ."

fold. First, the patentee still receives all that was bargained or paid for since he or she received the same size tract actually calculated and described in the patent. Second, policy disfavors binding the citizens generally by the fraudulent acts of a public official.[3]

In the present case, the district judge concluded that the David survey of 1877 was "grossly erroneous." Therefore, under the principles discussed above, the original patent would have conveyed the land only up to the fictitious meander line.

The landowners attack the factual premise of the district court's decision, contending first that the David survey was not grossly erroneous and, second, that any lands lying between the meander lines and the stream bed have been exposed by reductions in the volume of the Snake River since the time of the David survey. Under this second contention, the landowners claim title to these newly-exposed lands pursuant to the doctrine of reliction.[4]

These factual attacks must be considered in light of the rule that the district court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." Fed. R. Civ. P. 52(a). From our examination of the record, we cannot

[3]As the Supreme Court explained,

> [g]iving the patentees all the land in acres, stated in the patents and described and contained in lines and distances in such patents, and which is all they paid for, protects them, and the government ought not to be further concluded by the fraudulent acts of a public officer.

Security Land & Exploration Co. v. Burns, 193 U.S. 167, 182-83 (1904).

[4]Under the general application of this doctrine, land which becomes exposed by the gradual recession of water belongs "to the riparian owner from whose shore or bank the water has receded . . ." 93 C.J.S. *Waters* § 78 (1956). *See also,* the second *Report of the Special Master,* Utah v. United States, 427 U.S. 461 (1976), *published in,* 1976 Utah L. Rev. 245, 267-69.

conclude that the district judge was clearly erroneous when he found that the David survey was "grossly erroneous."[5] Accordingly, the case falls within the exception to the general rule and the title to the omitted lands remains with people of the United States.

II

This factual decision does not end our inquiry because the landowners' central contention is that the equitable principles of estoppel should operate to prevent the government from asserting ownership rights in the disputed lands. This argument is based essentially on four assertions: (1) the government became aware of the fraudulent survey as early as 1922, (2) the landowners and others relied on the government's refusal to resurvey after the 1922 investigation, (3) the landowners acted in good faith without notice of the erroneous nature of the survey, and (4) the landowners and their predecessors relied on the David survey.

The landowners raised this argument in the trial court and the district judge specifically found that all

[5]Our review of the record convinces us that the district judge correctly concluded that the David survey was grossly inaccurate. For example, the tract of land involved in this case is bounded on the southeast by the Snake River. Calculating the acreage of the tract by using David's meander line as the southeast boundary, the tract contains 38.47 acres. However, using the actual water line of the Snake River, the size of the tract contains an additional 108.36 acres.

Perhaps most revealing is the evidence summarized by the district court's Finding of Fact No. 11:

> A comparison of the David survey with the 1957 survey produces further enlightening evidence. It is demonstrated that where David's meander lines crossed section lines the David meander lines coincide with presentday meander lines of the river with marked consistency. However, between section lines, the David meander lines frequently vary greatly from the presently located meanders. I find it most unlikely that the course of the river has changed only between section lines.

In addition, David's field notes indicate that he completed the survey of the relevant portions of the Snake River in two days. The government established by uncontradicted evidence that this feat was a physical impossibility.

of the elements of estoppel were established by a preponderance of the evidence. Nevertheless, he concluded "as a matter of law that estoppel will not lie as to the United States." We disagree.

We are not unmindful of the well-worn statement that the government is not subject to the equitable defense of estoppel. *Utah Power & Light Co. v. United States,* 243 U.S. 389, 408-09 (1917); *Pine River Logging Co. v. United States,* 186 U.S. 279, 291 (1902); *Lee v. Munroe,* 11 U.S. (7 Cranch) 366 (1813). Our reading of the more recent decisions, however, leads us to conclude that this rule is no longer absolute.

In *Moser v. United States,* 341 U.S. 41 (1951), for example, a Swiss national sought an exemption from military service pursuant to the terms of a Swiss-United States treaty. The Selective Service Act provided, however, that individuals who claimed exceptions as neutral aliens would thereafter be debarred from obtaining United States citizenship. In response to an inquiry by the Swiss Legation, the State Department "led [Moser] to believe" that he could take advantage of the treaty without prejudicing his rights to citizenship. The Supreme Court noted that the government had created "misleading circumstances" upon which Moser "justifiably relied" and as a result was technically debarred from citizenship. On these facts, the Court refused to allow the government to deny Moser citizenship. While the *Moser* opinion is not cast in terms of estoppel, it has been broadly interpreted as allowing the government to be estopped. *See, e.g.,* 2 K. Davis, Administrative Law Treatise § 17.02, at 491 (1958); Comment, *Santiago v. Immigration & Naturalization Service – The Ninth Circuit Retreats from its Modern Approach to Estoppel Against The Government,* 1976 Utah L. Rev. 371, 377.

A decade later, the Supreme Court commented that some lower federal courts had specifically allowed estoppel against the government based on the conduct of its officials. *Montana v. Kennedy,* 366 U.S. 308, 314-15 (1961). However, the Court did not reach the estoppel question itself.

In *Immigration and Naturalization Service v. Hibi,* 414 U.S. 5 (1973), a Filipino alien requested naturalization under the Nationality Act of 1940 which provided for the naturalization of aliens who served honorably in the United States armed forces during World War II. Under the terms of the act, however, Hibi was required to petition for naturalization prior to 1947 and while still in active service. Unaware of these limitations, Hibi filed his petition long after expiration of his eligibility. Hibi then argued that the government should be estopped from adhering to the statutory time limit on the basis of the government's failure to advise him of his rights and failure to provide a naturalization official in the Philippines during the period of his eligibility.

The Court noted that its opinion in *Montana v. Kennedy, supra,* had left open the question of whether the government might be estopped on the basis of its "affirmative misconduct." The Court held that no such affirmative misconduct was present in *Hibi.* In so doing, however, the Court apparently agreed that affirmative misconduct might give rise to an estoppel against the government. *See Santiago v. Immigration and Naturalization Service,* 526 F. 2d 488, 492 n. 9 (9th Cir. 1975), *cert. denied,* 425 U.S. 971 (1976).

Clearly, these cases do not fully describe the dimensions of government estoppel. Nevertheless, we conclude from them that the Supreme Court has rejected the contention that under no circumstances may estoppel lie against the government.

In a recent series of important cases, we have explained the availability of government estoppel. In *United States v. Georgia-Pacific Co.*, 421 F. 2d 92 (9th Cir. 1970), we specifically considered the applicability of estoppel to the government. After a thorough review of the authorities, we held:

> One commentator has summarized the law in this area by saying that, "The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice." We agree, and we find that the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case.

Id. at 103.

Since then, we have strictly adhered to our position taken in *Georgia-Pacific*. In *United States v. Lazy FC Ranch*, 481 F. 2d 985 (9th Cir. 1973), we further explained two important aspects of this doctrine. First, we pointed out that since estoppel is an equitable doctrine, it should be applied "where justice and fair play require it." As applied to the government, it requires a balancing test. On the one side, the court must weigh the tendency of "the government's wrongful conduct to work a serious injustice . . . ." Against this consideration, the court must balance the countervailing interest of the public "not [to] be unduly damaged by the imposition of estoppel." *Id.* at 989. These policy factors

may militate against application of estoppel even though the technical elements of the doctrine are present. Second, we observed that some courts have developed a dichotomy which allows estoppel against the government when based on "proprietary conduct," and disallows estoppel based on conduct resulting from the government's "sovereign" functions. In *Lazy FC Ranch* we rejected this distinction. *Id.* at 989, n.5. In *United States v. Wharton*, 514 F. 2d 406 (9th Cir. 1975), a case involving title to public lands, we explicitly reiterated our position that estoppel may be applied against the government even when acting in its sovereign capacity. *Id.* at 410.

In *Santiago v. Immigration and Naturalization Service, supra*, 526 F. 2d 488, we once more recognized that estoppel may lie against the government. In addition, we expressly embraced the implication of *Hibi* that estoppel "can only be invoked if the governmental conduct complained of amounts to 'affirmative misconduct' . . ." *Id.* at 491. In that case, the issue of whether the government conduct must be affirmative was placed directly before our court en banc. Having resolved that important policy issue, we would fail to conform to the spirit of the precedent set in *Santiago* were we to limit the rule to immigration cases. Indeed, logic tells us there is no less reason for its application here than in *Santiago*. Thus we hold that the governmental action upon which the landowners wish to charge estoppel must be based upon affirmative misconduct.[6]

[6] *See* California Pac. Bank v. Small Business Admin., 557 F.2d 218 (9th Cir. 1977); Sun I1 Yoo v. Immigration & Naturalization Serv., 534 F.2d 1325 (9th Cir. 1976); In re Naturalization of 68 Filipino War Veterans, 406 F.Supp. 931 (N.D. Cal. 1975). *Cf.* Corniel-Rodriguez v. Immigration & Naturalization Serv., 532 F.2d 301 (2d Cir. 1976); Peignand v. Immigration & Naturalization Serv., 440 F.2d 757 (1st Cir. 1971); United States v. Benitez Rexach, 411 F.Supp. 1288 (D.P.R. 1976).

Having arrived at this point, we ordinarily would reverse and remand with instructions to the district court to reconsider the applicability of the estoppel doctrine. However, the district court found as a matter of *fact* that each of the elements of estoppel were established by a preponderance of the evidence. While the establishment of the elements may require a factual determination, the nature of the elements themselves raises questions of law.

We have outlined the ordinary elements of estoppel as:

(1) The party to be estopped must know the facts;
(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
(3) The latter must be ignorant of the true facts; and
(4) He must rely on the former's conduct to his injury.

United States v. Wharton, supra, 514 F.2d at 412; *United States v. Georgia-Pacific Co., supra,* 421 F. 2d at 96.

However, in this case, the formulation of the necessary elements of estoppel must be modified in light of the "affirmative misconduct" limitation expressed in *Santiago.* As a result, the elements must be read as requiring an affirmative misrepresentation or affirmative concealment of a material fact by the government. *Cf., United States v. 31.43 Acres of Land,* 547 F.2d 479, 482 (9th Cir. 1976); *United States v. Wharton, supra,* 514 F.2d at 412.

Having identified the estoppel elements, we now apply the law to the facts. Based on our review of the

district court's findings and the record as a whole, we find no affirmative act of misrepresentation or affirmative act of concealment upon which to base an estoppel. Certainly, the misconduct of David, the contract surveyor, is not sufficient. If it were, the rule of law discussed above, that a grossly erroneous meander line will not operate to convey property omitted as a result thereof, would be completely eliminated. In addition, there is no evidence that the government, at any time after becoming aware of the inaccurate survey in 1922, sought affirmatively to conceal or to misrepresent the true facts.

The district judge apparently believed that an estoppel could be based on the Interior Department's initial decision not to resurvey immediately after the 1922 investigation. Though the decision may be affirmative conduct, it is clear that it was not *misconduct.* In its disapproval of the Surveyor General's recommendation to resurvey, the Interior Department clearly announced the nature and basis of its decision. First, the Department stated that one reason for the disapproval was that "the investigation survey [did not] support, beyond question . . . that the original survey was fraudulent." Second, the Department stated that it did "not think that there is justification for raising a question as to riparian rights at this time." Finally, Interior stated that the investigation survey was to be filed in the office of the Surveyor General of Idaho "until such time as circumstances should develop the necessity for its revival."

Thus, the Interior Department candidly and forthrightly announced that its decision not to resurvey was based on the inconclusive nature of the investiga-

tive survey. The Department was careful to point out, however, that the David survey was not beyond question and that its decision not to resurvey would be reexamined when future circumstances so dictated.

Certainly this authorized administrative decision did not constitute a misrepresentation, concealment or other form of *misconduct* necessary to support an estoppel against the government. *Santiago v. Immigration and Naturalization Service, supra,* 526 F.2d at 493.[7]

It could be argued that there are some broad principles of equity which might assist the plight of the landowners in this case. But we have found no case which would allow the application of estoppel when there has been a failure of proof as to the required elements.[8] Indeed, the equitable discretion seems to cut only in the other direction. That is, the court can refuse to apply the doctrine when equity-policy considerations so demand,[9] even though the technical elements may be present. While we recognize that we have held that estoppel may lie in cases involving title to public lands, we are also aware that policy considerations demand that it not be so applied without compelling

[7]Our Brother Ely argues that the government's conduct here was in fact "affirmative" as required by *Santiago*. This argument, of course, misses the point. *Santiago* also requires that the government's action be "misconduct" in order to support the estoppel. We cannot find any misconduct in the Interior Department's declination to resurvey immediately after the investigation. In essence, the position urged by the dissent would require us to ignore the plain meaning of *Santiago*.

[8]*See Emergence of an Equitable Doctrine of Estoppel Against the Government – The Oil Shale Cases,* 46 Colo. L. Rev. 433, 451 (1975). *See generally* 3 J. Pomeroy, Equity Jurisprudence §§ 801 *et seq.* (5th ed. 1941).

[9]The government should be estopped *only* if policy and equity considerations so demand. Union Oil Co. v. Morton, 512 F.2d 743, 748-49 n.2 (9th Cir. 1975); United States v. Lazy FC Ranch, *supra,* 481 F.2d at 989.

reasons. This principle is a corollary to the constitutional precept that public lands are held in trust by the federal government for all of the people. U.S. Const. art. IV, § 3; see, *United States v. California,* 332 U.S. 19, 40 (1947). Thus, while one may be sympathetic with the landowners in this case, we must not be unmindful that the land involved belongs to all the people of the United States. Therefore, even if the landowners had proven all the elements necessary for estoppel, they would additionally need to demonstrate such equities which, on balance, outweigh those inherent equitable considerations which the government asserts as the constitutional trustee on behalf of all the people.[10]

III

The landowners also claim that the trial court erred by quieting title to the disputed lands in the government in contravention of 43 U.S.C. § 772 (1970).[11] We find no merit in this contention.

[10]In our view, this equity-policy consideration is also dispositive of another of the landowners' contentions. They argue that the lapse of time since 1922 when the government was put on notice of the inaccuracy of the David survey requires application of the doctrine of laches.

The traditional rule is that the doctrine of laches is not available against the government in a suit by it to enforce a public right or protect a public interest. 30A
C.J.S. *Equity* § 114 (1965). It may be that this rule is subject to evolution as was the traditional rule that equitable estoppel would not lie against the government. However, in the analogous estoppel situation, the invocation of the doctrine against the government requires a showing of affirmative misconduct. Even if there were some allowance for laches against the government, there is no reason why that doctrine should not be subject to at least the same strictures as estoppel. In any event, on the facts of this case, we deem the policy considerations so strong as to compel denial of the defense of laches.

[11]43 U.S.C. § 772 states in part:

> The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided,* That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

This statute is designed to allow the Interior Department to conduct *resurveys* or *retracements* of surveys in order to mark properly the boundaries of public lands. The statute further provides that such resurveys may not impair "bona fide rights or claims" of owners of lands affected by the resurvey. Under the rule of *Jeems Bayou, supra,* 260 U.S. 561, the lands here involved were "omitted" by the fraudulent survey. These lands were, by definition, unsurveyed lands until surveyed for the *first* time in 1957. Thus, Section 772 is simply not applicable.

The landowners' final contention is that the doctrine of estoppel by deed operates to prevent the government from asserting its title to the omitted lands. We consider this doctrine inapplicable to the present case in light of *Jeems Bayou*. The patentee's deed was based upon the David survey. However, the fraudulent or grossly erroneous nature of this survey resulted in the deed only conveying title up to a line represented by David's fraudulent meander line. The disputed lands lying between the fraudulent meander line and the actual water line were not conveyed by the patent and thus remain in the public domain. To hold the government estopped by the deed based on the fraudulent survey would destroy the important rule announced in *Jeems Bayou*.

AFFIRMED.

United States v. Ruby Co., et al, No. 75-1411

ELY, Circuit Judge, Dissenting:

I respectfully dissent. As I see it, the result reached by my Brothers is not only unjust, but also, that result is not legally required.

In Part II of its opinion, the majority concludes that estoppel is not here applicable against the Government because the Government committed no affirmative misconduct. I have no quarrel with my Brothers' statement as to the basic legal principle that should be applied. It is now clear beyond question that the law of our circuit requires a showing of affirmative misconduct before the Government may be estopped. *California Pac. Bank v. Small Business Admin., 557 F.2d 218, 224* (9th Cir. 1977); *Santiago v. I&NS,* 526 F.2d 488, 491-93 (9th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 971 (1976). It is the majority's application of the principle that I deeply feel to be thoroughly wrong.

As written by our Brother Choy, with whose perceptive comments I recently joined in *Santiago,* " '(a)ffirmative' and 'negative,' like 'misfeasance' and 'nonfeasance,' are indeed slippery terms. Each one of the claims paraphrased negatively can readily be restated affirmatively . . . But it is not *how* we cast the facts, but the facts themselves that should dictate the nature of relief warranted." *Santiago v. I&NS, supra,* at 495 (emphasis in original). Our decisions in this area have indicated that reasonable flexibility is not only desirable, but also is required. This is so that estoppel against the Government may lie "where justice and fair play require it." *United States v. Lazy FC Ranch,* 481 F.2d 985, 988 (9th Cir. 1973). Estoppel, as all know, is an equitable doctrine, designed to protect

the legitimate expectations of those who have relied to their detriment upon the conduct of another. *Russel v. Texas Co.*, 238 F.2d 636, 640 (9th Cir. 1956). *cert. denied*, 354 U.S. 938 (1957). Consequently, we should be reluctant to circumscribe the technical requirements for invoking it so narrowly and harshly as to eviscerate its beneficent protections and purposes. As my Brothers appropriately say, courts remain free to reject the application of estoppel to the Government, even though the required elements are present, when, in the exercise of their equitable discretion, they find that countervailing reasons of public policy so require. It seems anomalous, however, to define the elements of estoppel so strictly that the doctrine is stripped of its equitable underpinnings and made less accessible to those whom it is designed to protect. Accordingly, I cannot agree that the Government's conduct here was anything short of "affirmative."

The 1922 BLM investigation of the meander lines of the Snake River as represented by the David survey, 31 years after the issuance of the land patent, resulted in a conclusion that the meander line was fraudulent. Based on that investigation, the Surveyor General of Idaho recommended that another survey be made. Nevertheless, in 1923, fully apprised of all the facts, the General Land Office of the Department of the Interior consciously and deliberately disapproved the recommendation, allowing the David survey to stand unchallenged. As I see it, the Government, by this conduct, effectively represented to all interested parties that the David survey could be taken as authoritative and would facilitate the proper and secure passage of title. To characterize this conduct as no more

than a "decision . . . to take no affirmative action" seems to me to be an elevation of semantic distinction over reality. To reach its result, the majority plays with words and writes a tragedy. The Government, with full knowledge of the BLM investigation and the Surveyor General's recommendation, affirmatively acted by refusing to resurvey the disputed area. In making such a significant policy decision, the Government's conduct was no less affirmative simply because the outcome of its decision was a refusal to survey.[1] Restated, the Government did not unassertively refuse to act; rather, in fact, it acted positively and decisively even though its act was not to proceed further. Moreover, not until 1957, some 34 years later, did the Government evidence any intent to dispute the validity of the David survey. Again, the United States delayed, not bringing its suit to quiet title until eight more years had gone by. The position taken by the Government in 1965, when its suit was instituted, directly contradicted its representation in 1923 that the accuracy of the David survey would not be challenged. If the Government's current position, first urged in 1965 and upheld by the District Court and now by this Court, is correct in that the original, ancient survey was grossly erroneous, then the 1923 action of the Government in representing the David survey as reliable clearly constituted a misrepresentation, and, in fact, a misrepresentation by affirmative conduct. Thus, speaking frankly, I simply cannot understand how the majority can hold that, in reality, the Government was not guilty of "affirmative mis-

[1]My Brothers do not really challenge my proposition that the Government's conduct was affirmative. Their lack of conviction as to this is demonstrated by their writing, equivocally, "though the decision may be affirmative conduct . . ."

conduct." And the majority's bare conclusion that the conduct in this case is "clearly less egregious than the alleged misconduct in *Santiago*" adds nothing of substance to its rationale. Furthermore, the conclusion is mistaken. In *Santiago,* the conduct in question was merely the careless actions of immigration officials in validating the entry visas of otherwise excludable aliens. Here, we deal, not with carelessness, but with the most conscious and deliberate conduct on the part of the Government. While the facts of *Santiago* may be more "egregious" than those at hand here in that they implicated a human right and not a property right, I cannot at all see that the conduct in *Santiago* was any more affirmative than the conduct of the Government in this case. In truth and fact, it was much less affirmative.

While I am not unmindful of the majority's admonition that the public land belongs to the people of our country, I am unwilling to subvert the legitimate expectations and equities of the innocent landowners in our case by uttering generalized platitudes about the public welfare. These landowners and their predecessors in interest relied upon the accuracy of the David survey for over 60 years before the Government undertook to divest their title. To me, this concatenation of circumstances, taken as a whole, seems virtually intolerable from the standpoint of equity. Moreover, I do not see that the national interest will "be unduly damaged by the imposition of estoppel." *United States v. Lazy FC Ranch, supra,* at 989. The concurrence of the Government's affirmative misconduct and the overwhelming equitable considerations favoring the landowners drives me to believe that the Govern-

ment's misrepresentation that it had abandoned all claims, allowed to go uncorrected for so many years, should prevent the abuse that it has, in this case, visited upon some of its people.

Regardless of so-called public interest, our Country was founded upon the ideal that every citizen was a sovereign in his own right, and that one of them, even though only a poor householder on the bank of a stream, should never again live under the threat of authoritarian abuse and mistreatment. Now, while we profess outrage at what we see as unhumanitarian treatment of powerless peoples in some parts of the world, our court permits our own Government, supposedly benevolent, to void a patent it issued 86 years ago and, as to its validity, reaffirmed 32 years later. And to what end? That it regain title to lands, insignificant to the Government in area and long thought to be vested in a few private individuals. The tragic price of conferring this relatively inconsequential benefit on the Government is the enforced eviction of the innocent appellees and their families from their homelands. This injustice my Brothers do under what they perceive to be "the countervailing interest of the public". I decry that approach, believing that the truest, most immutable interest of the American public is the protection of individual citizens in their property rights, as in their personal rights, and the unswerving resistance to the type of governmental deception, abuse, and intrusion that we ordinarily associate with totalitarian regimes.

I would reverse.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 75-1411
vs.	)	ORDER
RUBY COMPANY, a Utah Corporation, et al.,	)	
Defendants-Appellants.	)	

Before: ELY and WALLACE, Circuit Judges, and BYRNE,* District Judge

The majoriy of the panel, as constituted, has voted to deny the petition for rehearing; Judge Ely has voted to grant panel rehearing. Judges Ely and Wallace have voted to reject the suggestion for rehearing en banc, and Judge Byrne has recommended rejection of the same.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable William Matthew Byrne, Jr., United States District Judge, Central District of California, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF IDAHO

RUBY COMPANY, a corporation,	)	
Plaintiff,	)	Civil No. 4-65-13
vs.	)	JUDGMENT
WALTER J. HICKEL, Secretary of the Department of the Interior, United States of America, et al.,	)	
Defendants.	)	
UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil No. 4-68-20
vs.	)	
RUBY COMPANY, et al.,	)	
Defendants.	)	

This case came on regularly for trial before the Court, sitting without a jury, on February 19, 1974. Oral and documentary evidence has been admitted and the case submitted on its merits. The Court has heretofore made formal written Findings of Fact and Conclusions of Law favorable to the plaintiff in Civil Case No. 4-68-20.

IT IS THEREFORE HEREBY ADJUDGED AND DECREED:

I.

That the complaint of the plaintiff in Civil Case No. 4-65-13, entitled Ruby Company, a corporation, v. Walter J. Hickel, Secretary of the Department of the Interior, United States of America, et al., is hereby dismissed with prejudice.

II.

That the plaintiff, United States of America, in Civil Case No. 4-68-20, have judgment on its complaint against the defendants.

III.

That all right, title and interest in an to the following described real property, being and located in Bingham County, State of Idaho, and more particularly described as follows, to wit:

Lots 12, 13, 14 and 15 in Section Thirty-three (33), Township Two (2) South, Range Thirty-five (35), East of the Boise Meridian

is hereby quieted in and declared to be that of the United States of America, free and clear of all claims by the defendants, their heirs, successors and assigns.

IV.

That no costs are allowed.

/s/ Ray McNichols

RAY McNICHOLS, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

RUBY COMPANY,	)	
Plaintiff,	)	Civil No. 4-65-13
vs.	)	
WALTER J. HICKEL, et. al.,	)	AMENDED
Defendants.	)	JUDGMENT
UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil No. 4-68-20
vs.	)	
RUBY COMPANY, et al.,	)	
Defendants.	)	

This case came on regularly for trial before the Court, sitting without a jury, on February 19, 1974. Oral and documentary evidence has been admitted and the case submitted on its merits. The Court has heretofore made formal written Findings of Fact and Conclusions of Law favorable to the plaintiff in Civil Case No. 4-68-20. The Court did, in conformance with said Findings of Fact and Conclusions of Law, enter its Judgment on November 21, 1974. By inadvertence the matter of certain right-of-way easements on behalf of the defendants, Short Line Railroad Company and Union Pacific Railroad Company, were omitted from the Findings of Fact and Conclusions of Law and the Judgment entered thereon. Amendments to the Findings of Fact and Conclusions of Law have heretofore been filed *nunc pro tunc*. The Court therefore enters an Amended Judgment.

IT IS THEREFORE HEREBY ADJUDGED AND DECREED:

I.

That the complaint of the plaintiff in Civil Case No. 4-65-13, entitled Ruby Company, a corporation, v. Walter J. Hickel, Secretary of the Department of the Interior, United States of America, et al., is hereby dismissed with prejudice.

II.

That the plaintiff, United States of America, in Civil Case No. 4-68-20, have judgment on its complaint against the defendants.

III.

That all right, title and interest in and to the following described real property, being and located in Bingham County, State of Idaho, and more particularly described as follows, to wit:

Lots 12, 13, 14 and 15 in Section Thirty-three (33), Township Two (2) South, Range Thirty-five (35), East of the Boise Meridian

is hereby quieted in and declared to be that of the United States of America, free and clear of all claims by the defendants, their heirs, successors and assigns, subject however to the existing right-of-way easement of the defendants Oregon Short Line Railroad Company and Union Pacific Railroad Company.

IV.

That no costs are allowed.

/s/ Ray McNichols

RAY McNICHOLS, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

RUBY COMPANY, a corporation, *Plaintiff,* *vs.* WALTER J. HICKEL, Secretary of the Department of the Interior, United States of America, et al., *Defendants.*	)	Civil No. 4-65-13 FINDINGS OF FACT AND CONCLUSIONS OF LAW
UNITED STATES OF AMERICA, *Plaintiff,* *vs.* RUBY COMPANY, et al., *Defendants.*	)	Civil No. 4-68-20

This case came on regularly for trial before the Court, sitting without a jury, on February 19, 1974. Oral and documentary evidence was admitted and post-trial briefs filed. The Court accepted and has considered additional post-trial evidence submitted by stipulation of the parties to augment the trial record. The matter stands submitted for final determination on the merits.

PRELIMINARY STATEMENT

The action was initiated on March 15, 1965, when the Ruby Company, a corporation, filed the complaint in Civil Action No. 4-65-13, naming as defendants, the then Secretary of Interior and other U.S. Government officials, seeking to set aside, cancel and annul a land survey of allegedly omitted lands carried out by the

Department of Interior, Bureau of Land Management, which survey culminated in an approved plat of said lands in 1957. The lands involved are situated along the Snake River in the eastern part of the State of Idaho. Plaintiff Ruby Company alleged that certain of said lands claimed to have been omitted from the original government survey of 1871 were held in fee through mesne conveyances to the Ruby Company from the patentee, and that through the purported survey and plat of 1957 the government defendants were taking the property of the plaintiffs without due process of law. The defendants moved to dismiss the complaint as being an unconsented suit against the United States of America and beyond the jurisdiction of the Court.

The Court felt that the jurisdiction was very questionable but was made aware of the extreme importance of the controversy. The 1957 survey seemed to disclose a substantial amount of land which appeared to be omitted lands and legally retained in government ownership. At the same time, said land had long been claimed and developed by the riparian owners along the river. Moved by the obvious need for definitive court determination of the question, the United States Attorney for the District of Idaho was urged to secure authority to institute a quiet title action to determine legal title to the realty. Commendably, such action was taken and the government, on March 20, 1965, filed Civil Action No. 4-68-20, naming the Ruby Company and some seventy other defendants, and praying to quiet title to certain real property in the State of Idaho, hereinafter more fully described by legal description. Plaintiffs alleged owner-

ship of the realty as being land originally omitted from the land survey of 1877 and being therefore unsurveyed public lands of the United States which the United States was entitled to survey and dispose of as public lands.

The defendants answered the complaint, denying plaintiff's affirmative claim that the lands were erroneously or fraudulently omitted from the 1877 survey and affirmatively alleging estoppel and that the 1957 survey deprived them of their property without due process of law.

An unusually long delay ensued. This delay was caused by a variety of factors — some of which were:

1. An interlocutory appeal was taken from a refusal of the trial court to cause a three-judge court to be empanelled. This appeal was later dismissed.
2. Attempts were made to secure remedial action by Congress to give legislative relief to the defendants.
3. Extensive negotiations were carried out aimed at a possible settlement of the controversy.
4. A great deal of discovery was required and attempts to find witnesses and extrinsic evidence as to the location of the channel of the Snake River in the involved area in 1877.
5. Changes of counsel brought about by the passing of time tended to add to the delay.

The court was a party to the delay and felt that both parties at all times acted in good faith.

When the trial finally became a reality, the two cases were consolidated for all purposes. It was stipu-

lated that the United States would proceed as plaintiff and the Ruby Company and named defendants would be treated as defendants. Further, by stipulation, the issue of due process was dropped. For all intents and purposes then the issues became those raised by the Government's quiet title action and the answers and affirmative defenses thereto, this being the case entitled United States of America v. Ruby Company, et al., Civil No. 4-68-20. On this basis the jurisdiction of the Court is unquestioned under the provisions of 28 U.S.C. §1345. Case No. 4-65-13 is ripe for dismissal.

FINDINGS OF FACT

The Court, being fully advised in the premises, makes the following Findings of Fact:

1. The lands involved in this litigation comprise 108.36 acres of land described as lying between the meander line of Lot 3, Section 33, Township 2 South, Range 35 E.B.M., and the Snake River (hereinafter frequently referred to as the lands in dispute).

2. On October 23, 1876, one John B. David (hereinafter David) was employed by the United States as a contract surveyor to survey the exterior and subdivision lines of Townships One (1) and Two (2) South, Ranges Thirty-five (35) and Thirty-six (36) East. The subject lands are encompassed therein. David's survey was to be accomplished in accordance with the Manual of Instructions to Surveyors General, 1871 Edition. He was required to meander both sides of streams such as the Snake River by taking the courses and distances of their sinuosities and the distances for crossing the streams

were to be taken by triangulation in order that the stream would be protracted with entire accuracy. David also was given special instructions which provided in essence that no lands were to be surveyed except those adapted to agriculture without artificial irrigation, irrigable lands or such as could be redeemed and for which there was sufficient water for reclamation and cultivation of the same, and timber or coal lands. However, these special instructions were to be considered with the Manual and in case of conflict the Manual of Instructions was to govern.

3. In late March and early April 1877 David surveyed the area. The field notes and survey plat described the east boundary of Lot 3, Section 88, Township 2 South, Range 35 E.B.M., as a meander line of the Snake River. This was prior to the high water runoff of that year, which high water runoff usually occurs in June or July.

4. The official plat of the David survey was prepared and filed in the Surveyor General's Office at Boise, Idaho, August 25, 1877, and certified and approved by that officer.

5. On June 29, 1891, the United States issued a patent to said Lot 3, containing 38.47 acres to one Rosehannah Forbes. The defendants, through their predecessors in interest, claim under this patent. They have been in open and notorious possession of the disputed lands since 1891, without challenge by the government until 1957, and have made substantial and valuable improvements thereon and have paid all taxes assessed against the property by the appropriate state taxing units.

6. In 1922 the government, through a party headed by one Robert Farmer, a cadastral engineer of the Bureau of Land Management, made an investigation of the meander lines of the Snake River as shown by the David survey in Township 2 South, Range 35 E.B.M., and other upstream areas. Farmer reported an opinion that the David meander of the Snake River in the area examined was fraudulent. As a result, the Surveyor General of Idaho recommended a resurvey be made of the lands reported by Farmer to have been omitted from the original survey. In 1923 the General Land Office, Department of Interior, disapproved the recommendation. This determination was based in part on the fact that the General Land Office seemed to have doubts that the original survey was fraudulent and felt that, even if fraud be proven, the value of the small amount of public land involved would not be worth the expense of resurvey. They recognized that practically all of the lands had passed into apparent private ownership and that the owners of the land on both sides of the river were claiming to the banks of the river.

7. The foregoing was the official position of the United States until 1957. The Bureau of Land Management ordered a resurvey in 1957 of the lands bordering the Snake River lying within the meander lines of the David survey of 1877. The Bureau of Land Management determined from the results of the resurvey that the survey of the original meanders was grossly erroneous and fictitious resulting in the omission of large areas of land from the original survey. The testimony of the government

indicated some fourteen to sixteen thousand acres of lands were found to be omitted along the Snake River in Idaho.

8. The resurvey of 1957 was approved in June, 1960. The lands in dispute were described in the plat of the resurvey as Lots 12, 13, 14 and 15, Section 33, Township 2 South, Range 35 E.B.M., containing a total of 108.36 acres. These lots as so platted lie between Lot 3, *supra,* and the newly meandered line of the Snake River.

9. As computed from the David plat based on his 1877 survey, Lot 3 as patented, and which purports to be bounded on the southeast by the Snake River contained 38.47 acres. The 1957 plat on which the government relies, shows that 108.36 acres of land lie between Lot 3 and the presently established meander line of the Snake River. This difference constitutes a gross error.

10. Evidence was admitted comparing the David survey with the 1957 resurvey for a distance of more than thirty miles along the Snake River above and below the disputed lands. It is clear from this evidence that the David survey, so far as it purported to establish the meander lines of the Snake River, contained many errors. Defendants' expert surveyor conceded this fact. In some areas along the river, and reasonably adjacent to the disputed lands, where the exact location of the channel of the river as it existed in 1877 could be positively established, the meander line depicted by David was shown to be extremely inaccurate.

11. A comparison of the David survey with the 1957 survey produces further enlightening evi-

dence. It is demonstrated that where David's meander lines crossed section lines the David meander lines coincide with present-day meander lines of the river with marked consistency. However, between section lines, the David meander lines frequently vary greatly from the presently located meanders. I find it most unlikely that the course of the river has changed only between section lines.

12. Further examination of the David meander lines in the compared areas reflect many straight lines from one point to another for distances that are unusually long for lines purporting to follow the sinuosity of the Snake River. Some such straight lines are as much as a mile in length. Obviously these lines were not run in compliance with the surveyor's instructions.

13. David's field notes indicate that he completed the survey of the meander lines in Township Two (2) South, Range Thirty-five (35), E.B.M. in two days. By undisputed expert testimony it was established that this feat is a "physical impossibility".

14. Based on his extensive investigation and particularly on the facts heretofore found in findings Nos. 10, 11, 12 and 13, one Joseph Gawron, an experienced cadastral engineer, well acquainted with the area and all of the surveys thereof, gave as his opinion that many of the meander lines as purportedly fixed by David were wholly fictitious and had never been run on the ground in conformance with David's instructions.

15. The channel of the Snake River adjacent to the property in dispute was, in 1877, when David made his survey, in substantially the same location

as at present and the proper meander line of the Snake River in that area in 1877 was substantially where now placed by the 1957 survey and plat thereof.

16. As claimed by the defendants, the area in dispute was prior to and since 1857 subject to some periodic flooding in runoff periods. However, the evidence of the defendants which purports to support the accuracy of the David meander line as located at Lot 3 is unpersuasive.

17. Defendants have asserted that the plaintiff is estopped to now claim the lands in question in view of past conduct of government officials. Since I expect to determine as a matter of law that estoppel will not lie as to the United States, I do not fully develop the factual findings on this issue beyond those found *supra*. However, if the plaintiff were subject to the equitable defense of estoppel, all of the elements thereof are established by a preponderance of the evidence. The plaintiff's officials knew at least by 1923 of the now alleged facts of the erroneous survey; in determining officially not to make claim to the land involved because of the minor quantity involved, they led the defendants and their predecessors in interest to justifiably believe that the government claim would not be enforced; the defendants didn't have any contrary knowledge; the defendants did reasonably rely on the conduct of the plaintiff's officers and were damaged by this detrimental reliance.

From the foregoing facts found, I conclude as a matter of law as follows:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this case in which the United States of America is plaintiff.

2. That Civil Case No. 4-65-13, Ruby Company, a corporation, v. Walter J. Hickel, et al., should be dismissed.

3. That the 1877 survey made by John B. David and the plat thereof so far as the meander line of Lot 3, Section 33, Township 2 South, Range 35 East is grossly erroneous.

4. The 108.36 acres of land lying between the original meaner line of Lot 3, as established by the 1877 survey and the actual water line of the Snake River, omitted from the said survey by said gross error, are unsurveyed public lands of the United States which the plaintiff was entitled to survey and is entitled to dispose of under the public laws of the United States.

5. The elements of the doctrine of estoppel are present and fully supported by the evidence, however estoppel will not lie against the United States of America in this case.

6. Judgment should be entered in favor of the United States of America and against the defendants, and title to Lots 12, 13, 14 and 15 in Section Thirty-three (33), Township Two (2) South, Range Thirty-five (35) East of the Boise Meridian, State of Idaho, should be quieted in the United States of America, free and clear of all claims by the defendants, their heirs, successors or assigns.

7. No costs should be allowed.

8. Judgment will be entered accordingly.

/s/ Ray McNichols

RAY McNICHOLS, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,	)
Plaintiff,	)Civil No. 4-68-20
vs.	) AMENDMENT
RUBY COMPANY, et al.,	) TO FINDINGS
Defendants.	) OF FACT
	) AND
	)CONCLUSIONS
	) OF LAW

The defendants, Oregon Short Line Railroad Company and Union Pacific Railroad Company, named defendants in the above case, have made a timely Motion, under Rule 52(b) of the Federal Rules of Civil Procedure, for an amendment to the Findings of Fact, Conclusions of Law and Judgment entered in the above cause on November 21, 1974. Disposition of these defendants' claims was inadvertently omitted from said Findings of Fact, Conclusions of Law and Judgment and that omission is intended to be corrected *nunc pro tunc* by this amendment. Except for the specific amendments herein provided for, the said Findings of Fact and Conclusions of Law, dated November 21, 1974, are affirmed:

AMENDMENT TO FINDINGS OF FACT

The Findings of Fact heretofore filed are amended to provide an additional paragraph, numbered 18, to read as follows:

"18. By Stipulation entered into on the 19th day of February, 1974, between the United States of America, plaintiff herein, and the defendants

Oregon Short Line Railroad Company and Union Pacific Railroad Company, and filed herein on said date, it was agreed that said defendant railroads' predecessor in title and operation had complied with the requirements of the General Right of Way Act of March 3, 1875, 18 Stat. 482, and said defendant railroads were, and they are, in possession of a railroad right-of-way easement over and across the land involved herein by virtue of said compliance."

AMENDMENT TO CONCLUSIONS OF LAW

The Conclusions of Law heretofore entered, as aforesaid, are amended by an amendment to paragraph 6 thereof, to read as follows:

"6. Judgment should be entered in favor of the United States of America and against the defendants, and title to Lots 12, 13, 14 and 15 in Section Thirty-three (33), Township Two (2) South, Range Thirty-five (35), East of the Boise Meridian, State of Idaho, should be quieted in the United States of America, free and clear of all claims by the defendants, their heirs, successors or assigns, subject however to the existing right-of-way easement of the defendants Short Line Railroad Company and Union Pacific Railroad Company."

/s/ Ray McNichols

RAY McNICHOLS, JUDGE
UNITED STATES DISTICT COURT